Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THEODORE B. GOULD,

Petitioner,

v.

BANK OF NEW YORK and FRED STANTON SMITH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does a bankruptcy court have authority to depart from the plain language of 28 U.S.C. § 1654 to violate the fundamental right of self-representation in a civil action?

Does equity require that a third-party proponent of a confirmed plan of reorganization, under which a liquidating trust was created, *inter alia*, for the fraudulent purpose of subordinating and eliminating loans extended in good faith and previously authorized under 11 U.S.C. § 364, be held liable for the repayment of such postpetition "super-priority" loans?

Is a trustee appointed under a confirmed plan of reorganization personally liable for the damage to a liquidating trust's property attributable to his failure to seek a court's instructions, concerning the right of repayment of "super-priority" loans, prior to the commencement or distribution under the plan's provisions when the trustee pays claims with a subordinate priority to the liens securing repayment of the loans, in reliance on the indemnity of a third-party with adverse interests to the trust?

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PETITION FOR A WRIT OF CERTIORARI

Theodore B. Gould, *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. 1) has not been reported. The opinion of the district court (App. 3) is unreported. The Memorandum Order of the bankruptcy court after remand issued on May 11, 1998, (App. 13) is unreported. The bankruptcy court's order dismissing an adversary complaint for declaratory relief, entered on December 8, 1997 (App. 21) is unreported. The bankruptcy court's order denying a motion to schedule an evidentiary hearing on remand (App. 25), issued on March 9, 1994, is unreported. The initial opinion of the court of appeals, entered on January 9, 1991 (App. 29) is unreported. The opinion of the district court remanding the proceedings to the bankruptcy court, entered on November 4, 1988 (App. 31) is unreported. The bankruptcy court's original order (App. 43), issued on March 20, 1987, and its order denying the Bank of New York's ("Bank's") motion for reconsideration (App. 49), issued on April 1, 1987, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2000 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1988).

STATUTORY PROVISIONS INVOLVED

1. Section 1654 of Title 28, United States Code, Judiciary and Judicial Procedure, provides:

> 28 U.S.C. § 1654. **Appearance personally or by counsel**
>
> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

2. Section 364 of Title 11, Bankruptcy, provides, in part:

> 11 U.S.C. § 364. **Obtaining credit**
>
> (c) If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt –
>
> (1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
>
> (2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
>
> (3) secured by a junior lien on property of the estate that is subject to a lien.
>
> . . .
>
> (e) The reversal or modification on appeal of an authorization under this section to obtain credit

or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.

STATEMENT

Introduction

The principal questions presented in this case concern the administration of a liquidating trust created after confirmation under the provisions of a plan of reorganization, in accordance with 11 U.S.C. § 1123(a)(5)(B), see ***Holywell Corporation v. Smith,*** 503 U.S. 47, 55 (1992), and the fiduciary duties of a trustee to the liquidating trust's beneficiary to use reasonable care and skill to preserve the trust property.

This case also raises the question of whether under the equitable doctrine of substantive consolidation, the repayment could lawfully be eliminated of postpetition loans extended in good faith and authorized under 11 U.S.C. § 364(c), 2 *supra,* or a liquidating trust could be created for the fraudulent purpose, *inter alia,* of subordinating and eliminating the liens securing repayment of such "super-priority" administrative claims for the purpose of enriching the plan's proponent, a third-party with adverse interests to the trust's beneficiary.

The "Super-Priority" Loans

This case concerns the statutory right for the repayment of postpetition loans,[1] extended in good faith to the debtor MCLP for the completion of the Miami Center's[2] construction[3] and MCLP's operating expenses,[4] which were secured by "super-priority" liens authorized by the bankruptcy court, after notice and hearings,[5] pursuant to 11 U.S.C. § 364(c). See 2 *supra*.

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[1] The principal amount of the loans disbursed under the bankruptcy court's orders was as follows:

Order	*Amount*
January 9, 1985	$1,612,139.27
February 27, 1985	615,757.91
April 1, 1985	2,489,507.78
Total	$4,717,404.96

[2] MCLP developed the "Miami Center," an office tower, hotel and retail complex in Miami, Florida. See 503 U.S. at 50.

[3] The prior record before this Court has established that the Miami Center was appraised "as is" for the fair market value of $255,600,000, as of November 15, 1984.

[4] The bankruptcy court's order, entered on April 1, 1985, authorized MCLP to borrow $2,489,507.78 from the petitioner's estate to pay real property taxes secured by a statutory lien on the Miami Center with a priority superior to the Bank's mortgages.

[5] The bankruptcy court authorized loans by the following parties to the debtor MCLP:

Lender	*Amount*
Holywell Corporation	$1,889,230.74
Twin Development Corporation	252,460.26
Theodore B. Gould	2,489,507.78
Total:	$4,717,404.96

During the proceedings before the bankruptcy court, the Bank objected to the authorized liens securing repayment of the "super-priority" loans. Nevertheless, the Bank did not appeal the bankruptcy court's orders. See 2 *supra*, 11 U.S.C. § 364(e). Instead, the Bank later proposed a reorganization plan ("Bank's plan") under which Holywell Corporation ("Holywell") was liquidated and its property (after payment of separate debts) was transferred after confirmation to respondent Smith as trustee of the Miami Center Liquidating Trust, see 503 U.S. at 53, and all of the assets of the petitioner's estate were vested in Smith as the fiduciary of a trust of an individual, ***Id.*** at 54.

The Bank's Plan

The bankruptcy court's order confirming the Bank's amended plan held that the Bank's secured claim against MCLP's estate was "undersecured", ***In re Holywell Corp.***, 54 B.R. 41, 42 (Bkrtcy. S.D. Fla. 1985). Nevertheless, adequate funds were transferred to the trustee on October 11, 1985 to pay the principal amount of all the claims of creditors against the various bankruptcy estates, including postpetition interest on the Bank's undersecured claim, the "super-priority" loans, and the claims of the Miami Center Joint Venture ("MCJV"). See ***In re Holywell Corp.***, 75 B.R. 793, 795 (Bkrtcy. S.D. Fla. 1987), see 8 n. 8, *infra*.

The Bank's plan provided for a "modified form of substantive consolidation" of the debtors' estates,[6] 54 B.R. at 43, and the subordination of the valid claims of insiders. See *In re Holywell Corp.*, 913 F.2d 873, 880 (11th Cir. 1990).[7]

The Bankruptcy Court's Order Authorizing Repayment Of The "Super-Priority" Loans

The Bank's plan defined the "super-priority" loans as an unimpaired Class 1, "Administration Claim," which would be paid on the plan's Effective Date, as

> [a] cost or expense of administration of these Chapter 11 cases, including ***any actual, necessary expenses of preserving the estates, and any***

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[6] The district court's opinion affirming the bankruptcy court's confirmation order and substantive consolidation of the debtors' estates held:

> The effect of substantive consolidation upon the debtors in this Chapter 11 proceeding is more than merely procedural; it entails the combination of the assets and liabilities of the individual debtors and the elimination of inter-debtor claims, ***excepting those [super-priority"] loans incurred under the authorization of the Bankruptcy Court.*** (Emphasis added)

Holywell Corporation v. Bank of New York, 59 B.R. 340, 347 (S.D. Fla. 1986).

[7] The Bank's plan was confirmed without the hearing required by 11 U.S.C. § 1128(a), and the petitioner's objections that, *inter alia*, (a) the plan failed to provide for the payment of income taxes, (b) the plan was not feasible under 11 U.S.C. § 1129(a)(11), (c) substantive consolidation was proposed for the fraudulent purpose of taking property without compensation, and (d) eliminated repayment of the "super-priority" loans, see App. 39, n. 15, were denied, without a hearing, as lacking in merit, 54 B.R. at 43.

> ***actual, necessary expenses of operating the Debtors' businesses from and after the Petition Dates . . . and all allowances approved by the*** [Bankruptcy] ***Court in accordance with the*** [**Bankruptcy**] ***Code.*** (Emphasis added) Art. I, ***Definitions,*** at 1.

The bankruptcy court's order authorizing the trustee to repay the "super-priority" loans held:

> The Bank . . . argues that the substantive consolidation of the five estates, which was provided in the plan confirmed in 1985, extinguished these debtor claims. ***The plan, which must be strictly construed against its proponent, the Bank,*** makes no explicit provision for this result. ***It was not suggested by the Bank in the Disclosure Statement or otherwise before confirmation.*** (Emphasis added) App. 46.

In the bankruptcy court's order denying the Bank's motion for reconsideration, Bankruptcy Judge Britton, the original presiding judge, agreed that the Bank's plan provided for the transfer to the Miami Center Liquidating Trust of the title and rights of repayment of the "super-priority" loans. Nevertheless, Bankruptcy Judge Britton concluded:

> **I would not have confirmed a plan nullifying the 1985 orders that are at issue here.** (Emphasis added) App. 50.

The bankruptcy court's order held:

> The original lien of the Bank of New York . . . was fully satisfied by the trustee's sale in October 1985 of the Miami Center property to the Bank's nominee. (Footnote omitted)
>
> . . . [T]he Bank's subsequent lien created by the July 30, 1985 Second Amendment to the Amended plan (C.P. No. 479) . . . [under which] the Bank agreed to fund, up to a limit of

> $14,417,679, any shortage in the trustee's ability to pay the MCJV lease claim.[8] . . will [be] a trustee's certificate which will be an administrative claim (class 1):
>
> > "secured by, all assets of the debtors' estates ***after payment or provision has been made for all other Class 1 claims*** (Emphasis added). . . . " (Bank's Notice of Filing of Second Amendment, C.P. No. 854, par. 2)
>
> It is clear that the Bank's subsequently acquired lien for its contingent advance to the trustee is *subordinate* (original emphasis) to the movants' administrative claims. Therefore, ***neither the Bank nor the trustee has any present or potential claim based upon this transaction which is superior to the movants'*** [administrative] ***claims***. (Emphasis added) App. 46.

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[8] Smith has testified:

GOULD: Was adequate funds transferred to you on October 11, 1985 to pay the principal amount of all claims, including MCJV's Claim 502 for unpaid rent:

SMITH: Yes.

Bkrtcy. S. D. Fla., ***Transcript***, June 29, 1998, at 150. See, also 75 B.R. at 795 ["The confirmation of the plan constituted a finding of adequate assurance that the trustee could . . . (pay MCJV's Claim). ***The assets of the substantively consolidated estates of the debtors are now and always have been adequate for that purpose*** (emphasis added)."]

As of October 10, 1985, the trustee had *$35,538,346.14*, after a reserve for the payment of claims against Holywell's estate, to pay claims of *$32,548,106.51*, against MCLP's estate, including the "super-priority" loans and MCJV's claims.

The District Court's Remand Order On The Bank's Appeal

The district court's Remand order, entered on November 4, 1988, affirmed the bankruptcy court's prior holding that repayment of the previously authorized "super-priority" loans, in accordance with 11 U.S.C. § 364, was secured by liens with a *superior* priority to any claims of creditors against MCLP's estate, App. 42, but reversed the bankruptcy court's judgment that the plan's "modified form of substantive consolidation," 54 B.R. at 43, did not extinguish the "super-priority" loans.[9]

The court held that the Miami Center Liquidating Trust both "owed and owned" the "super-priority" loans, App. 40, instead of concluding that the "super-priority" loans were preconfirmation administrative claims, secured by recorded liens, against the proceeds of MCLP's estate, see 503 U.S. at 58-59, and although the trustee was vested with legal title, the petitioner was the beneficial owner of the "super-priority" loans, ***Id.*** at 56, entitled to repayment of the principal and accrued interest after the trustee's payment of the claims of the creditors of the various bankruptcy estates, ***Id.***

The district court remanded the case

(i) in order to clarify and/or supplement its Orders to assure that repayment of the loans be

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[9] See App. 40. The district court held that under an "owned and owed" theory where "substantive consolidation has occurred and the resultant Liquidating Trust has been created . . . repayment (would be) entirely within the trust itself. . . . " The same district judge wrongly held in the tax case later before this Court that the liquidating trustee's duties were "more akin to those of a disbursing agent, rather than an assignee or fiduciary" (***In re Holywell Corp.***, No. 88-0795-CV-Kehoe, July 31, 1989); compare 503 U.S. at 52.

> made to the *estates* (original emphasis) of Gould and Holywell,[10] subject to the claims of the remaining creditors of the estate,[11] and (ii) to ***ascertain, where necessary, the specific source of the repayment funds.*** (Emphasis added). App.42.

The Prior Opinion of the Court of Appeals

In the separate appeal of the district court's judgment, holding that ownership of the "super-priority" loans was transferred to the Miami Center Liquidating Trust and the loans were repayable from the assets of MCLP's estate[12] to the trustee, the court of appeals held:

> . . . the appellants challenge the district court's determination that certain "super-priority" loans be repaid to the estates of the debtors, rather than the discharged debtors. The district court's determination is mandated by the express terms of the plan.

The Remanded Proceedings

On March 9, 1994, more than five years after the district court remanded this case to the bankruptcy court

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[10] It is an uncontroverted fact that all of the claims of creditors against Holywell's estate, in the total amount of $4,244,109.39, including interest, had been paid on or before May 29, 1986.

[11] Compare 503 U.S. at 54-55 [The "new" Miami Center Liquidating Trust is *not* a bankruptcy estate. It is "a separate and distinct trust" which was created for the express purpose of liquidating Gould's estate."]

[12] See App. 47 ["The trustee is authorized and directed to pay these claims if and when the proceeds of the liquidation of the assets of MCLP are sufficient to meet these priority obligations."]

to ascertain the source of funds from MCLP's estate[13] for repayment of the "super-priority" loans, a different bankruptcy judge denied the petitioner's motion for an evidentiary hearing to satisfy the district court's remand, and held:

> Unless and until the Trustee determines that there will be Trust assets available for distribution to the Debtors after all creditors with priority claims[14] have been paid, the issues on remand are not ripe for adjudication. App. 28.

On December 8, 1997, the bankruptcy court entered an order, drafted by the Bank's attorney, dismissing a complaint alleging that (a) the Bank was liable under its indemnity for repayment of the "super-priority" loans; and (b) Smith had failed to preserve the "super-priority" loans as trust property and had paid claims from the assets of MCLP's estate with a *subordinate* priority to the liens securing repayment of the "super-priority" loans. In reliance on a contempt order issued prior to this Court's ***Holywell*** opinion (under which the Petitioner prevailed) concerning the trustee's duty to pay taxes, the bankruptcy court concluded that

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[13] It is an undisputed fact that the trustee agreed to the Bank's postconfirmation modification of various provisions of the confirmed plan in violation of 11 U.S.C. § 1127, and permitted the Bank to breach its agreement to complete the closing adjustments of the Miami Center's sale within 45 days. Nevertheless, as of January 31, 1991, the proceeds of MCLP's estate were *$13,360,790.83*, and the unpaid balance of the "super-priority" loans was *$8,103,123.67*.

[14] See 503 U.S. at 58 [A creditor under title 11 is a person or entity with a preconfirmation claim.] Also, compare 8 *supra* [The Bank's Trustee's Certificate is "*subordinate* (original emphasis) to the movants' [administrative] claims."]

[i]n accordance with the "Order of Certification of Contempt entered by this Court on May 1, 1990 and affirmed by the District court, Gould was required to obtain representation by "an attorney admitted to practice before the United States District Court for the Southern District of Florida and the United States Bankruptcy Court" in order to preclude Gould from rearguing serial claims and arguments "continuously rejected by this and other Courts. . . . "[15] The

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[15] The bankruptcy court's civil contempt order, which was drafted by Smith's attorney and entered prior to this Court's ***Holywell*** opinion, concerned the petitioner's refusal to cause the dismissal of postconfirmation lawsuits filed in the United States District Court for the Western District of Virginia, by Holywell's nondebtor subsidiaries engaged in business only in Virginia and the District of Columbia, alleging that the trustee's failure to pay income taxes for the tax year ended July 31, 1985, was a breach of fiduciary duty. The trustee's contempt motion alleged that the petitioner's demand made upon Smith for the payment of the taxes attached to the sale of the property, and violated the orders of the United States District Court for the Southern District of Florida. The trustee's contempt motion was based on:

> . . . ***the explicit ruling of the bankruptcy court denying his*** **[petitioner's]** ***motion to establish reserves for the payment of the same taxes*** (emphasis added). . . . It [petitioner's motion] will also violate the effect of the dismissal of his lawsuit against the Liquidating Trustee personally in which Mr. Gould sought damages for, *inter alia*, the failure to pay the alleged taxes. ***In re Holywell Corp.***, 93 B.R. 780 (S.D. Fla. 1988), *aff'd* 88 [sic] F.2d 1086 (11th Cir. 1989), *cert. denied*, ___ U.S. ___.

Compare 503 U.S. at 52 ["the trustee must pay the tax on the income attributable to the . . . property because § 6012(b)(3) requires him to make a return as the 'assignee' of the 'property . . . of a corporation'."]

> Court finds that Gould's failure to comply with the prior Order warrants dismissal of the complaint, App. 22. Gould has also failed to make payment to the Liquidating Trust of . . . [Rule 9011] sanctions of $24,770.00. . . . The court also finds that Gould's existing non-compliance with the contempt award is a second and independently sufficient basis for the dismissal of the complaint, App. 22.
>
> The complaint also includes claims which are barred by [Florida's] statutes of limitations and by prior adjudications. . . . ***The Trustee in this case has consistently acted and made disbursements in accordance with the confirmed plan and with Orders of this court,*** (emphasis added) App. 23.

On May 11, 1998, almost ten years after the district court's remand, the bankruptcy court entered a Memorandum Order, drafted by the attorneys for the trustee and the Bank, which denied as moot the repayment of the "super-priority" loans on the grounds that

> 8. It is now apparent that the Trust will not have sufficient assets with which to pay all these obligations. The Liquidating Trustee's report of March 31, 1998 reflects cash of $1,089,410.96. The Trustee's Certificate[16] held by the Bank had

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[16] As of April 31, 1987, the amount of MCJV's Claim 502 was *$14,557,754*, see 75 B.R. at 796, of which *$2,232,702* was accrued postconfirmation interest attributable to the Bank's wrongful subordination of MCJV's claims and interests, 913 F.2d at 880. It is undisputed that the trustee failed to pay MCJV's claim in accordance with the provisions of the Bank's plan in reliance on the Bank's indemnity.

a balance due of $11,232,638.37[17] in June of 1997. Since that time, the Trustee has made a payment of *$500,000 to the Bank,*[18] but additional interest exceeding $400,000[19] has accrued. Without estimating the final fees and costs payable to the Trustee, his counsel, and his accountants,[20] it is apparent that the Trust will be unable to repay

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[17] The bankruptcy court's order, issued on March 9, 1994, authorizing the issuance of a Trustee's Certificate *nunc pro tunc* to the Bank, in the amount of *$22,128,484.05* as of February 6, 1991, held that "[t]he priority of the Trustee's Certificate is specified by the Plan. ***It is behind Class 1 administration claims*** (emphasis added) and behind ***the allowed prepetition claims*** of all creditors other than those affiliated with the debtors" (emphasis added). The accrued postconfirmation interest was *$15,269,243* as of April 5, 1994, attributable to the trustee's failure to pay MCJV's claims in accordance with the district court's instructions, see 913 F.2d at 877.

[18] As of October 25, 1998, the trustee had paid accrued interest of *$5,088,471.70* to the Bank under the Trustee's Certificate and *$1,536,526.15* plus interest of *$546,192.81* for its subordinated, unsecured claim for the reimbursement of attorneys' fees and expenses.

[19] The trustee has entered into a settlement with the Bank, limiting to $15,000,000 the damages caused by the Bank's misrepresentations as the plan's proponent concerning income taxes, ***Smith v. Bank of New York***, 161 B.R. 302, 307 (Bkrtcy. S.D. Fla. 1993) [The Bank's representations concerning the plan's feasibility had been held to be materially false.]

[20] As of October 26, 1998, the trustee paid *$7,225,682.86* for the Miami Center Liquidating Trust's fiduciary fees, attorneys' fees, and accounting expenses incurred to defend the Bank's scheme, *inter alia*, to relieve the trustee of his duty to pay the liquidating trust's income taxes, see 503 U.S. at 57.

over $10,000,000[21] of the amount owed to the Bank as holder of the Trustee's Certificate. App. 17.

> ***The Bank's indemnity agreement, as reaffirmed by the Bank to the Trustee in their settlement agreement in the income tax adversary proceeding, remains in place*** (emphasis added) in the event that any of the Debtors' appeals are successful and result in the imposition of a cost upon, or obligation of, the Trustee. . . . App. 18.

On March 12, 1999, the district court affirmed the bankruptcy court's Memorandum Order and held, concerning the district court's remand order:

> [A]s Judge Kehoe's original emphasis on the word *"estates"* indicates repayment of the Post-Petition Loans would not become an issue until the aim of the Consolidated Plan was achieved and the Trust's debt[22] was completely satisfied. App. 8.
>
> Given the factual finding of insufficient funds, the Bankruptcy Court held that the remand issues concerning repayment of the Post-Petition Loans were moot. That is, since the Trust

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[21] For the tax year ended July 31, 1998, the trustee reported on a Form 1120, U.S. Corporation Income Tax Return, that Holywell had the following "Other Liabilities to the Bank":

Legal	$ 169,018
Trustee's Certificate	17,703,218
Total:	$17,872,236

[22] Despite the fact that the trustee's payment of the preconfirmation claims of creditors against the various bankruptcy estates are *not* tax deductible expenses of the Miami Center Liquidating Trust, the trustee's accounting has commingled the postconfirmation liabilities of the Miami Center Liquidating Trust with the preconfirmation claims of creditors under title 11. Compare 503 U.S. at 58-59.

> lacked funds to satisfy its outstanding obligations, there were necessarily no assets left to redistribute to the discharged Debtors. Thus, the Post-Petition Loans owed by the Debtor Miami Center Limited Partnership to the Debtors Gould and Holywell could not be repaid, App. 10.

The court of appeals affirmed, without oral argument in an unpublished opinion, and concluded that the bankruptcy court's dismissal of the adversary complaint, alleging breach of fiduciary duty, was not an abuse of discretion, citing ***Matter of Dolleslager***, 618 F.2d 322, 324 (5th Cir. 1980), App. 2.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals in this case shows the importance of judicial reform concerning the appellate process to defend the integrity of the federal courts as an impartial forum to resolve controversies. When a trial court is biased and the orders, judgments and opinions of the judges of a court represent a pattern that departs from the plain language of the law, the rules of equity jurisprudence, and the uncontroverted facts, the standard of good behavior on which judges hold office is violated, and the appellate process will not preserve the rights of the individual, protect the public interest, and administer justice.

The court of appeals appears to have purposefully misconstrued[23] this case:

> Gould argues that the bankruptcy court erred in dismissing as moot the issue of payment of his post-petition loan on remand, as it should have held that he was owed the money because the Liquidating Trust would have had sufficient funds to repay the debts had the trustee correctly distributed the funds and had the Bank not committed fraud in obtaining the trustee's certificate. He also argues that the bankruptcy court abused its discretion when it dismissed his complaint filed in the adversary proceeding for his failure to comply with previous contempt orders. App. 2.

First, the complaint for a declaratory judgment in this case concerned the following simple questions:

1. Was the Bank liable under its indemnity for repayment of the "super-priority" loans based on the bankruptcy court's prior judgment, ***Smith v. Bank of New***

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[23] In the prior related proceedings before this Court, the court of appeals had held that "the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary," ***In re Holywell Corp.***, 911 F.2d 1539, 1546 (11th Cir. 1990), and "the reorganized debtor, not the liquidating trustee, is responsible for such [income] taxes." ***Id.*** at 1545. Thus, the court of appeals and lower courts held that the property of my estate was transferred to a trustee but that I, personally, was liable for the payment of the Miami Center Liquidating Trust's income taxes. Compare 26 U.S.C. § 641(b) ["the tax shall be paid by the fiduciary"]; also 503 U.S. at 56.

York, 161 B.R. at 306,[24] because the proceeds of MCLP's estate had been adequate to repay loans made in good faith and the trustee used the funds to unjustly enrich the Bank?

2. Alternatively, was Smith personally liable for repayment of the "super-priority" loans, because he (a) failed to preserve the "super-priority" loans as property of the Miami Center Liquidating Trust, (b) failed to act with undivided loyalty to the Miami Center Liquidating Trust, and its beneficiary, in reliance on the Bank's indemnity, and (c) paid claims with a subordinate priority to the

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[24] The present bankruptcy judge's predecessor held:

> The court finds the October 10, 1985 indemnity agreement . . . requires no parole evidence to interpret what is plainly stated and intended.[Internal f.n. 8]

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[8] The evidence of the parties' intent supports the Trustee's contention that the indemnity agreement was designed to indemnify him against anything that might result from consummation of the bank's plan.

The bankruptcy court also held, in reliance on the following deposition, that "the bank drafted the indemnity agreement specifically to protect the Trustee and to induce him to proceed with the closing," *Id.* at 307. The record in the prior proceedings before this Court was:

> [W]e obtained the letter of indemnity so that if any claims were made upon the Liquidating Trustee for payment of unpaid [income] taxes . . . [and] the question and payment of the allowed super-priority claims . . . the Liquidating Trustee would be completely indemnified. . . .

S.Ct., *Joint Appendix*, Nos. 90-1361, 90-1484, October Term 1991 at 170.

liens securing repayment of the "super-priority" loans in reliance on the Bank's indemnity?[25]

Second, the question of whether the Bank engaged in fraud to obtain a Trustee's Certificate was *not* an issue in this case, because the bankruptcy court's order had been affirmed that the priority of the Trustee's Certificate was *subordinate* to the liens securing repayment of the "super-priority" loans. See 8 *supra*.

Third, the abuse of discretion standard of review is not applicable in this case to the question of whether the bankruptcy court erroneously dismissed the petitioner's complaint. Fed.R.Civ.P. 41(d), ***Involuntary Dismissal***, is not applicable to the failure to pay Bankr. Rule 9011 sanctions[26] and the bankruptcy court's reliance on its prior Order of Certification of Contempt, 12 *supra*, was

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[25] Smith, and his attorney, have testified:

> GOULD: Do you dispute Mr. Stettin's testimony that the bank is liable under its indemnity if the trustee paid from the proceeds of MCLP's estate junior claims with a subordinate priority to the liens securing the payment of the super-priority loans?
>
> STETTIN: . . . He said if the court makes a determination that we paid obligations that were later determined to be inferior in right of payment to others –
>
> SMITH: It's covered by our indemnity.

Bkrtcy. S.D. Fla., ***Deposition***, March 13, 1998 at 40.

[26] ***Dolleslager*** held, *quoting* ***Flaksa v. Little River Marine Constr. Co.***, 389 F.2d 885, 888 (5th Cir. 1968):

> . . . except in the most "flagrant circumstances," . . . the trial court ought not to resort to sanctions which deprives the litigant of his opportunity to pursue his claim." 6187 F.2d at 324.

clearly erroneous and a manifest injustice after transferring all of the property of my estate to Smith, 503 U.S. at 55, and denying Arnold & Porter's fee application as an administrative expense of the Miami Center Liquidating Trust.[27]

1. The Fundamental Right Of Self-Representation In A Civil Action Is Unlimited And Unqualified.

A writ of certiorari should be granted in this case because the court of appeals' decision effectively restricts

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[27] Reflecting its apparent misunderstanding of (a) this Court's *Holywell* opinion, that the Miami Center Liquidating Trust is not a bankruptcy estate, and (b) the relationship between the Miami Center Liquidating Trust and the petitioner, as the beneficiary of that Trust, the bankruptcy court held, in its ***Findings of Fact And Conclusions Of Law Denying The Application Of Arnold & Porter***, March 9, 1994 at 6:

> A&P's "success" in the Tax Case, however, imposed a large tax liability on the Liquidating Trust. The result of A&P's "success" on behalf of the Discharged Debtors is a decreased distribution to creditors. Clearly such a result is not a "benefit" to the estate; the only benefit accrued to the taxing authorities and the Discharged Debtors, who otherwise would have been personally liable for the taxes. Internal f.n. 2
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> ---
>
> [2] The Court observes that by prosecuting an appeal, the benefit of which could only accrue to them personally, the Discharged Debtors acted in a manner inconsistent with their continuing fiduciary duties to creditors under the Bankruptcy Code.

The bankruptcy court had previously denied the application of Williams & Connelly for attorneys' fees and allowed $4,825 to Robert M. Musselman & Associates as an administrative expense of the Miami Center Liquidating Trust.

the petitioner's fundamental right to self-representation, singles out the petitioner for improper treatment, and, thus, the court's judgment departs from the accepted and usual course of judicial proceedings, and sanctions such a departure by a lower court from the observance of fundamental rights and justice as to require the exercise of this Court's supervisory power.

The court of appeal's decision is contrary to the plain language of 28 U.S.C. § 1654, 2 *supra*, violates the constitutional right of due process of law, and is inconsistent with the historical precedent of this Court, and the decisions of every other court of appeals,[28] that the fundamental right of self-representation in a civil action is unlimited and unqualified. This Court has held that a prisoner's rights may be limited in a criminal case,[29] but only the court of appeals has held that a bankruptcy court has the authority to require a litigant in a civil action to engage counsel. Thus, the question is whether any provision of the laws concerning the administration of bankruptcy proceedings grants to a court the power to

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[28] See ***United States v. Odom***, 523 F.2d 875, 877 (9th Cir. 1970); also ***United States ex rel. Maldonado v. Denno***, 348 F.2d 12, 15 (2d. Cir. 1965), ***cert. denied***, 348 U.S. 1007 (1966) [In civil cases, the right of self-representation is "unqualified" if invoked prior to trial).

[29] ***Price v. Johnston***, 334 U.S. 266, 285 (1947 [Lawful incarceration limits "the otherwise unqualified right . . . to parties in all the courts of the United States to 'plead and manage their own causes personally'."] ***Carter v. United States***, 329 U.S. 173, 174 (1946) ["Under appropriate circumstances, the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant."]

contravene the fundamental statutory right of self-representation in a civil action and the constitutional right of due process of law.

"[L]itiousness alone is no reason to enjoin future litigation," ***DeNardo v. Murphy,*** 781 F.2d 1345, 1348 (9th Cir.), ***cert. denied,*** 476 U.S. 1111 (1986). See also ***Green v. Warden,*** 699 F.3d 364, 370 (7th Cir.), ***cert. denied,*** 461 U.S. 960 (1983) ["the right requires that a person's access to the courts be 'adequate, effective, and meaningful' (citations omitted). . . . The touchstone is not total or unlimited access, but meaningful access."] Compare, ***Farguson v. MBank Houston, N.A.,*** 808 F.2d 358, 360 (5th Cir. 1986).

In ***United States v. Dougherty,*** 473 F.2d 1113 (D.C. Cir. 1972), the court of appeals reversed a lower court's ruling that a court had authority to require a party held in contempt during trial to engage counsel and concluded:

> in sum, whether or not the right of *pro se* representation has a constitutional foundation it is patently a statutory right, see § 1654; this right was not only conferred by Congress in 1789 but . . . was recognized by Congress as a fundamental right. We conclude that this right must be recognized if it is timely asserted, . . . and if it is not itself waived, either expressly, or constructively, as by disruptive behavior during trial. 473 F.2d at 1123.

The failure to comply with the bankruptcy court's orders to cause the dismissal of lawsuits filed in August 1987, alleging that Smith's failure to pay postconfirmation income taxes in accordance with the applicable provisions of the Internal Revenue Code was a breach of fiduciary duty, cannot be characterized as "disruptive behavior during trial."

In *O'Reilly v. New York Times Co.*, 692 F.2d 863 (2d Cir. 1982), the Second Circuit Court of Appeals held, citing *Faretta v. California*, 422 U.S. 806 (1975)[30]:

> We start with the proposition that the right of self-representation in civil cases conferred by § 35 of the Judiciary Act of 1789, although not enjoying the constitutional protection subsequently afforded to the right of self-representation in criminal cases . . . is a right of high standing, not simply a practice to be honored by a court depending on its assessment of the desiderata of a particular case. 692 F.2d at 867.

In *Andrews v. Bechtel Power Co.*, 780 F.2d 124 (1st Cir. 1985), the First Circuit Court of Appeals held:

> The court could not coerce Andrews into accepting representation he did not want. While there is no constitutional right of self-representation in civil cases . . . there is a statutory right of long-standing to such self-representation, 28 U.S.C. § 1654. 780 F.2d at 137.[31]
>
> . . . .
>
> A necessary part of the right of self-representation is that a litigant, especially a plaintiff

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[30] This Court has held that "[i]n the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation." 422 U.S. at 812.

[31] See *Adams v. United States*, 317 U.S. 269, 270 (1942) ["The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. . . . 'What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of the great constitutional safeguards by treating them as empty verbalisms.' "]

> in a civil case, cannot be coerced into accepting appointed counsel rather than proceeding *pro se*.

In ***Brown v. Wainwright***, 665 F.2d 607 (11th Cir. 1982), the Eleventh Circuit Court of Appeals held "that a right of self-representation was recognized in this circuit prior to ***Faretta***," 665 F.2d at 610, and ***Scott v. Chapman***, 617 F.2d 99, 102 (5th Cir. 1980), binding precedent in the Eleventh Circuit Court of Appeals, citing ***Juelich v. United States***, 342 F.2d 29 (5th Cir. 1965), stated in dictum that the right of self-representation is either a constitutionally protected right or a statutory right under 28 U.S.C. § 1654.

In ***Traylor v. City of Atlanta***, 805 F.2d 1420, 1421 (11th Cir. 1986), quoting ***Procup v. Strickland***, 792 F.2d 1069, 1074 (11th Cir. 1986), the court of appeals held that "a litigant may be 'severely restricted as to what he may file and how he must behave in his applications for judicial relief. He just cannot be completely foreclosed from any access to the court'." See 19 n. 26 *supra*, quoting 618 F.2d at 324; also ***Reshard v. Britt***, 819 F.2d 1573 (11th Cir. 1987) ("[T]he right to proceed *pro se* under 28 U.S.C. § 1654 is a fundamental statutory right that is afforded the highest degree of protection.") Nevertheless, in a related proceeding, the same panel of the court of appeals has erroneously held, citing ***Procup***, that

> Gould's argument that he has an unqualified right to represent himself is without merit. . . . ***The test is whether the restriction imposed by the court serves as an absolute bar to filing any suit in a federal court*** (emphasis added). . . . First, this is a bankruptcy case involving a sophisticated businessman and not a prisoner. Second, ***this restriction is limited to proceedings in the overall bankruptcy case*** (emphasis added) and does not foreclose the federal courts

> to Gould as a whole. Third, and most significantly, this Court has already upheld the [civil] contempt order in question. . . .

In re Holywell Corp., No. 99-10536, January 13, 2000. See 12 n. 15 *supra*.

2. Equity Required Concluding That The Bank of New York Was Liable Under Its Indemnity For Repayment Of The "Super-Priority" Loans.

A writ of certiorari should be granted in this case because the court of appeals' decision, in affirming that repayment of the post-petition super-priority loans under the Bank's indemnity was moot so far denies the petitioner's rights, in law and equity, under the facts of this case that the exercise of this Court's supervisory power is required.

The bankruptcy court's order directing the trustee to repay the "super-priority" loans relied on the Bank's prior representations in its Disclosure Statement as the plan's proponent, and on its failure to file an appeal of the court's order authorizing the loans. See 11 U.S.C. § 364(e), 2 *supra*. Thus, the Court held:

> The reimbursement priority granted . . . in the 1985 orders is unambiguous. The following pertinent paragraph appears in each order:
>
> > "The loan to Miami Center Limited Partnership shall be ***secured by a lien on the assets of Miami Center Limited Partnership which shall be senior to the lien of all other creditors*** (emphasis added) except the lien of the Bank of New York, and ***shall have a priority over the payment of any and all administrative expenses of the Miami Center Limited Partnership.***" (Footnote omitted) (Emphasis added) App. 44.

The bankruptcy court also held:

> The Bank argues . . . that the subordination of the claims of creditors affiliated with the debtors to Class 8, behind all other creditors including the Class 7 claim of MCJV, requires that payment of movants' post-petition claims to Holywell and Twin (who are affiliated creditors) is subordinated to payment of class 7 prepetition debt. . . . ***If the Bank intended by this provision to subordinate post-petition claims and thus nullify this Court's three earlier orders, it should have revealed that intention explicitly.*** (Emphasis added) App. 47.

See also 59 B.R. at 350-351["the record is silent and as to how (and whether) these liens were subordinated or eliminated."]

In ***Carpenter v. Wabash Ry.***, 309 U.S. 23, 29 (1934), this Court held that when the priority of a claim is given by statutory command, a court is without equitable power to place it in any other position. See ***Wheeling-Pittsburgh Steel Corp. v. McClure***, 836 F.2d 153, 162 (3d Cir. 1987); also ***Magniac v. Thomson***, 56 U.S. 281, 299 (1853) (equity may not be invoked to abrogate a legal right). Thus, the "super-priority" loans had to be repaid from the proceeds of MCLP's estate to the Miami Center Liquidating Trust in accordance with the statutory rights under 11 U.S.C. § 364(c), 2 *supra*, and the trustee's equitable duty was to preserve the trust property for the petitioner's benefit. Instead, the Bank was unjustly enriched, because the trustee relied on the Bank's indemnity to pay postconfirmation claims with a subordinate priority to the liens securing repayment of the "super-priority" loans, 19 n. 25 *supra*, including interest paid to the Bank and to the trustee's attorneys, fiduciary fees, legal fees and accounting expenses to defend against the Bank's

fraudulent scheme to impose the Miami Center Liquidating Trust's income taxes on the petitioner.

This Court's cases in equity have held that "[w]here the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage of him, in every such case there is a positive fraud." ***Smith v. Richards***, 13 Pet. 26, 36 (1839), quoting Story's ***Equity***. This Court has also held that if a trustee

> fails in the discharge of his trust, he is liable to the parties injured thereby. . . . And parties combining and confederating with him to despoil the estate in any way must be held as participants in the . . . breach of trust.

Glascow v. Lipse, 117 U.S. 327, 333-334 (1885). See also ***Seminole Nation v. United States***, 62 S.Ct. 1049, 1054 (1942). In this case, equity required the bankruptcy court to conclude under the law of the case doctrine and the uncontroverted facts in the remanded proceedings that the Bank was liable under its indemnity for repayment of the "super-priority" loans, 161 B.R. 306; also 7 *supra* [the plan must be strictly construed against the Bank.] See ***Restatement (2nd) Trusts***, § 63, ***Fraudulent Purpose*** ["a trust is invalid if the purpose of the settlor in creating the trust is to defraud creditors or other persons."]

3. Smith Is Personally Liable For Repayment Of The "Super-Priority" Loans

A writ of certiorari should be granted in this case, most importantly, because the court of appeals' decision, in affirming dismissal of petitioner's complaint that Smith is personally liable for the post-petition super-priority loans in his capacity as trustee raises important

questions concerning the administration of a liquidating trust created under the provisions of a confirmed plan in accordance with 11 U.S.C. § 1123(a)(5)(B), see 503 U.S. at 55, and a trustee's fiduciary duties to the trust's beneficiary.

A trust is "a fiduciary relationship with respect to property, subjecting the person by whom title is held to equitable duties for the benefit of another person," Restatement (2d), ***Trusts***, § 2 (1959), and "[u]ncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty," 62 S.Ct. at 1055, n. 12, quoting ***Meinhard v. Salmon***, 249 N.Y. 458, 164 N.E. 545 (1928). See also ***Restatement (2nd) Trusts***, § 170, ***Duty of Loyalty*** ["The trustee is under a duty to administer the trust solely in the interest of the beneficiary," and Comment g, "The trustee is under a duty to the beneficiary in administering the trust *not* to be guided by the interest of a third person."] In ***Buffum v. Peter Barceloux Co.***, 53 S.Ct. 539 (1932), this Court held:

> A trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value [and] . . . [n]othing he can do afterwards . . . will affect that liability, except at the option of the beneficiary complaining of the wrong. 53 S.Ct. at 542.

It is an uncontroverted fact established in the prior proceedings before this Court that Smith was *not* an officer of the bankruptcy court as trustee of the Miami Center Liquidating Trust, because the Bank caused his appointment and retained authority "to terminate the rights of the Trustee then acting under the Trust and appoint a new Trustee," Art. V, ***Creation of Trust*** at 26. "The trustee, therefore, [was] . . . not acting as the fiduciary of Gould's bankruptcy estate," 503 U.S. at 55. "[T]he Miami

Center Liquidating Trust . . . [was] a 'trust'[32] and respondent Smith [was] its fiduciary," *Id.* Under these circumstances, "[t]he most effective sanction for good administration is personal liability," *Mosser v. Darrow*, 341 U.S. 267, 274 (1951).

In this case, instead of protecting himself against personal liability by "seek[ing] instructions from the court, given notice to creditors and interested parties," *Id.* at 274, with respect to his fiduciary duties to pay the Miami Center Liquidating Trust's income taxes and repayment of the "super-priority" loans prior to the commencement of distribution under the provisions of the Bank's plan, Smith (a) sought the Bank's indemnity, 18 n. 24 *supra*, (b) conspired with the Bank to deprive the petitioner of judicial relief under the mootness doctrine applicable in bankruptcy proceedings, see 838 F.2d at 1558,[33] and (c) failed to preserve the property transferred

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[32] The Miami Center Liquidating Trust was terminated on September 9, 1998.

[33] STETTIN: ***The trustee commenced substantial consummation of the plan deliberately as soon as the plan became effective. Mr. Wolff has testified that the reason they did that was . . . in an attempt as best they could moot any appeals that were being taken. The Bank wanted the plan to be substantially consummated as soon as possible and Mr. Wolff agreed with that theory.*** (Emphasis added)

GOULD: ***Did Mr. Wolff and . . . Mr. Smith testify that they relied upon the Bank's indemnity in proceeding with signing the contract of sale and also the distribution for the purposes of mooting the*** [appeal of the bankruptcy court's Confirmation Order]? (Emphasis added)

to his fiduciary custody, 15 *supra* [No funds to repay the "super-priority" loans]. See ***Restatement (2nd), Trusts,*** § 176, ***Duty to Preserve the Trust Property*** ["The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property."]

The economic reality in this case, contrary to the district court's opinion that the Miami Center Liquidating Trust "owed and owned" the "super-priority" loans, is that if the trustee had sought the bankruptcy court's instructions, prior to the commencement of distribution under the provisions of the Bank's plan in reliance on the Bank's indemnity, and had paid the claims of creditors against the various bankruptcy estates in accordance with 11 U.S.C. § 507, the proceeds from the principal and accrued interest due on the "super-priority" loans would have been preserved for distribution to the petitioner.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

THEODORE B. GOULD, *pro se*
P. O. Box 6279
Charlottesville, VA 22906

STETTIN: ***They relied upon the Bank's indemnification for all of their conduct in consummating the plan.*** (Emphasis added)

Bkrtcy. S.D. Fla., ***Transcript***, June 29, 1998, at 113.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10270
Non-Argument Calendar

D.C. Docket No. 98-02172-CV-FAM

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

HOLYWELL CORPORATION,
THEODORE B. GOULD, individually and
acting on behalf of
THE MIAMI CENTER LIQUIDATING TRUST,

Plaintiffs-Appellants,

versus

THE BANK OF NEW YORK and
FRED STANTON SMITH,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(January 25, 2000)

Before COX and WILSON, Circuit Judges, and FAY, Senior Circuit Judge.

PER CURIAM:

Theodore Gould appeals from the district court's order affirming the bankruptcy court's dismissal of his

case on remand as moot, and grant of the defendants' motion to dismiss his complaint in a separate adversary proceeding for a declaratory judgment (No. 97-1119-BKC-PGH-A).

On appeal, Gould argues that the bankruptcy court erred in dismissing as moot the issue of payment of his post-petition loan on remand, as it should have held that he was owed the money because the Liquidating Trust would have had sufficient funds to repay the debts had the trustee correctly distributed the funds and had the Bank not committed fraud in obtaining the trustee certificate. He also argues that the bankruptcy court abused its discretion when it dismissed his complaint filed in the adversary proceeding for his failure to comply with previous contempt orders.

As the second court in review of the bankruptcy court's judgment, the bankruptcy court's factual findings are reviewed for clear error, and its legal conclusions *de novo*. *In re Mroz*, 65 F.3d 1567, 1571-72 (11th Cir. 1995). This Court reviews the bankruptcy court's dismissal of claims for abuse of discretion. *Houston Citizen Bank & Trust Co. v. Dolleslager*, 618 F.2d 322, 324 (5th Cir. 1980).

Upon review of the parties' pleadings, the bankruptcy and district court's orders, and consideration of the parties' briefs and relevant law, we conclude that there is no reversible error. The judgment of the district court is affirmed for the reasons set forth in its comprehensive ORDER AFFIRMING BANKRUPTCY COURT ORDERS AND CLOSING CASE filed on March 12, 1999.

AFFIRMED.

CLOSED CIVIL CASE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 98-2172-CIV-MORENO

IN RE:

HOLYWELL CORPORATION, *et al.*

THEODORE B. GOULD, acting on behalf of THE MIAMI CENTER LIQUIDATING TRUST,

Appellant,

vs.

THE BANK OF NEW YORK and FRED STANTON SMITH,

Appellees.

_____/

ORDER AFFIRMING BANKRUPTCY COURT ORDERS AND CLOSING CASE

(Filed Mar. 12, 1999)

THIS CAUSE came before the Court upon the consolidated appeal of two Bankruptcy Court orders: (1) the December 8, 1997 Order Granting the Defendants' Motion to Dismiss the *Pro Se* Adversary Complaint for Declaratory Relief; and (2) the May 11, 1998 Order Denying as Moot Debtors' Remanded Motion for Repayment of Post-Petition Loans. Since the Court finds that the Appellants failed to address any legal or factual error in the first order and that dismissal for mootness in the second order was warranted given the Bankruptcy Court's finding of insufficient Trust funds, both orders are AFFIRMED.

PROCEDURAL POSTURE

This case came to the Court over ten years ago as an appeal from the Bankruptcy Court. On November 4, 1988 Judge Kehoe reversed in part and remanded. In 1991 the Eleventh Circuit affirmed Judge Kehoe's ruling in an unpublished *per curiam* opinion. The Bankruptcy Court did not take up the issues on remand until 1998, however, because that was the first year it could make an availability of funds ruling required to resolve the issues on remand. On May 11, 1998 the Bankruptcy Court issued its Order addressing the issues remanded by Judge Kehoe.

The second Bankruptcy Court order on appeal dismissed a related *pro se* complaint brought by Theodore B. Gould. A consolidated appeal from the two orders was filed here as 98-2172-UNGARO-BENAGES and subsequently transferred to Judge Kehoe because of his previous work on the case.

BACKGROUND

A. The Miami Center Bankruptcies

The Miami Center Limited Partnership borrowed money from the Bank of New York ("Bank") to develop "Miami Center," a hotel and office building complex in Miami, Florida. In August 1984, after it defaulted on the loan, the Miami Center Limited Partnership and four affiliated Debtors – Holywell Corporation, Chopin Associates, Miami Center Corporation, and Theodore B. Gould – each filed Chapter 11 bankruptcy petitions. The Bankruptcy Court consolidated the five cases, but each Debtor's estate remained separate and legally distinct

pending approval of a "Consolidated Plan of Reorganization."

The estates of Gould and Holywell Corporation, which Gould also owned, owned three office buildings in Washington, D.C. which had been pledged to the Bank as collateral for its loan to the Miami Center Limited Partnership (the "Washington Properties"). The Debtors Gould and Holywell Corporation ("Holywell") moved the Bankruptcy Court for authorization to sell the Washington Properties. The Bank, in turn, moved for a determination that the proceeds of this sale were cash collateral of the Bank. The Bankruptcy Court authorized the sale of the Washington Properties and ordered that the proceeds otherwise payable to the Debtors Gould and Holywell constituted cash collateral of the Bank. The net proceeds from the sale of the Washington Properties, approximately $32 million, were deposited into interest-bearing accounts in 1985.

B. The Post-Petition Loans

After the sale of the Washington Properties, the Debtor Miami Center Limited Partnership sought authorization to borrow from the proceeds of the sale to pay construction costs and property tax obligations of the ongoing Miami Center project. This request was granted and the Debtor Miami Center Limited Partnership was given authority to borrow about $4.7 million from the Debtors Gould and Holywell (the "Post-Petition Loans"). The Post-Petition Loans were then given "super-priority status" over all other claims against the Miami Center Limited Partnership, except for the Bank's lien. That is,

the Debtors Gould and Holywell were entitled to repayment ahead of any of the Miami Center Limited Partnership's creditors except the Bank.

After these Post-Petition Loans, the Bankruptcy Court approved a "Consolidated Plan of Reorganization" and created the "Miami Center Liquidating Trust." According to the Consolidated Plan, all the property of the Debtors became the property of the Trust. Thus, the assets of the five Debtor estates were no longer separate but, instead, were pooled together for the Trustee to liquidate in order to satisfy all the creditors' claims. In exchange, the liability of each individual Debtor estate was discharged and the discharged Debtors, in effect, became the lowest priority creditors of the Trust.

Pursuant to the Consolidated Plan of Reorganization, the Miami Center was sold to the Bank's designee in consideration of cash paid to the Trust and cancellation of the Bank's lien. At this point, the Bank's debt was fully satisfied and it was no longer a creditor of the Trust. Subsequently, the Bank loaned the Trust over $20 million to pay a creditor's claim for furniture, fixtures and equipment in the Miami Center project. In exchange, the Bank received a Trustee's Certificate entitling the Bank to repayment of its loan ahead of any distribution of the Trust's assets to the discharged Debtors or their affiliates.

Subsequently, the court-appointed Trustee, Fred Stanton Smith, moved for permission to repay the Post Petition Loans (i.e., repay the $4.7 million which the Debtors Gould and Holywell loaned to the Debtor Miami Center Limited Partnership before the Consolidated Plan became

effective). The Bankruptcy Court approved repayment of the Post-Petition Loans and the Bank appealed.

C. Judge Kehoe's Remand Order

On appeal, Judge Kehoe reversed the Bankruptcy Court's order authorizing repayment of the Post-Petition Loans. He held that after the Consolidated Plan, "the assets and liabilities of all the consolidated Debtors . . . bec[a]me merged, eliminating all inter-debtor obligations and guarantees." Thus, Judge Kehoe reasoned, for purposes of consolidation the Post-Petition Loans ceased to exist either as an asset of the Debtors Gould and Holywell or a liability of the Debtor Miami Center Limited Partnership. Rather, the consolidated Trust both owned and owed the Post-Petition Loans, rendering the repayment obligation a "nullity" since any repayment by the Trust would be to itself.

Nonetheless, Judge Kehoe affirmed the Bankruptcy Court "to the extent the subject loans are repayable as 'super-priority' obligations of the Miami Center Limited Partnership ahead of the claims of any Miami Center Limited Partnership creditors[.]" That is, although consolidation temporarily nullified inter-debtor obligations like the Post-Petition Loans, consolidation did not permanently extinguish them as the Bank had argued. Accordingly, Judge Kehoe remanded to the Bankruptcy Court:

> (i) in order to clarify and/or supplement its Orders to assure that repayment of the loans be made to the *estates* of Gould and Holywell, subject to the claims of the remaining creditors of the estate, and (ii) to ascertain, where necessary, the specific source of the repayment funds.

Clearly, then, as Judge Kehoe's original emphasis on the word *"estates"* indicates, repayment of the Post-Petition Loans would not become an issue until the aim of the Consolidated Plan was achieved and the Trust's debt was completely satisfied; only then would inter-debtor obligations become significant.

STANDARD OF REVIEW

A district court has jurisdiction to hear an appeal of a final bankruptcy order or judgment and functions as an appellate court in reviewing a bankruptcy court's decision pursuant to 28 U.S.C. § 158 (a), (c). *See, e.g., Smith v. Strickland*, 178 B.R. 524, 525 (M.D. Fla. 1995). On appeal, a district court "may affirm, modify or reverse a bankruptcy court's judgment, order or decree or remand with instructions for further proceedings." Fed. R. Bankr. Proc. 8013.

A district court may not set aside the factual findings of the bankruptcy court unless they are clearly erroneous. *In re Club Associates*, 951 F.2d 1223 (11th Cir. 1992). In contrast, a bankruptcy court's conclusions of law are reviewed *de novo. See, e.g., In re The Georgian Villa*, 55 F.3d 1561, 1562 (11th Cir. 1995); *In re Southeast Banking Corp.*, 178 B.R. 291, 293 (S.D. Fla. 1995); *In re Davidson*, 178 B.R. 544, 547 (S.D. Fla. 1995). Review of conclusions of law includes determination of what law applies and the ultimate conclusions resulting from the application of the law to the facts. *See, e.g., In re Southeast Banking Corp.*, 178 B.R. at 293; *Smith v. Strickland*, 178 B.R. at 525 ("[A]ppellants are entitled to an independent, *de novo* review of all conclusions of law and the legal significance

accorded to the facts."). Moreover, interpretation and application of the Bankruptcy Code is a question of law, to which a *de novo* standard of review is applied. *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp. (In re Piper Aircraft, Corp.)*, 58 F.3d 1573, 1576 (11th Cir. 1995); *Haas v. I.R.S. (In re Haas)*, 48 F.3d 1153, 1155 (11th Cir. 1995).

LEGAL ANALYSIS

A. The December 8, 1997 Order of Dismissal

In 1997 Gould filed a *pro se* Complaint for Declaratory Relief on behalf of the Trust, alleging that the Trustee Fred Stanton Smith was liable for repaying junior claims ahead of the super-priority Post-Petition Loans and that the Bank was liable as well because it agreed to indemnify the Trust for losses caused by the consolidation.

The Bankruptcy Court dismissed the Complaint for four independent reasons: (1) Gould filed the Complaint *pro se* despite a previous Bankruptcy Court contempt order, affirmed by the District Court, that required Gould to appear with counsel to prevent him from "rearguing serial claims and arguments continuously rejected by this and other courts."; (2) Gould owed over $29,000 on an outstanding contempt sanction issued by the Bankruptcy Court and affirmed by the District Court; (3) the Complaint was time barred under Florida's statute of limitations on equitable actions; and (4) the Complaint failed to state a claim against the Trustee in his individual capacity. Notably, the Bankruptcy Court dismissed the Complaint with leave to amend so Gould could refile after complying with the contempt orders. He never did either.

Since the Appellants fail to address any of the Bankruptcy Court's reasons for dismissal, much less establish legal or factual error, the Order of Dismissal is AFFIRMED without further comment.

B. The May 11, 1998 Order Denying as Moot Debtors' Remanded Motion for Repayment of the Post-Petition Loans

The Appellants argue that the Bankruptcy Court's May 11, 1998 order is not "in conformity" with Judge Kehoe's remand. On remand, the Bankruptcy Court made a finding of fact that upon reducing the last of the Trust's assets into cash in 1997, the Trust did not have sufficient funds to meet its outstanding obligations:

> The only remaining creditors of the Liquidating Trust other than the discharged Debtors and their affiliates are the Trustee, his counsel, his accountants, and the Bank as the holder of a Trustee's Certificate. . . . Without estimating the final fees and costs payable to the Trustee, his counsel, and his accountants, it is apparent that the Trust will be unable to repay over $10,000,000 of the amount owed to the Bank as holder of the Trustee's Certificate.

Given the factual finding of insufficient funds, the Bankruptcy Court held that the remand issues concerning repayment of the Post-Petition Loans were moot. That is, since the Trust lacked funds to satisfy its outstanding obligations, there were necessarily no assets left to redistribute to the discharged Debtors. Thus, the Post-Petition

Loans owed by the Debtor Miami Center Limited Partnership to the Debtors Gould and Holywell could not be repaid.

The Bankruptcy Court's order is in conformity with Judge Kehoe's remand. Judge Kehoe did not mandate that the Bankruptcy Court order repayment of the Post-Petition Loans under any and all circumstances. Instead, Judge Kehoe employed qualifying language: "to the extent necessary to be in conformity with this opinion, this matter is remanded to the Bankruptcy Court . . . to ascertain, where necessary, the specific source of repayment funds." Thus, Judge Kehoe's remand was intentionally drafted with the flexibility needed to account for changed circumstances. Given its factual finding of insufficient funds, there was nothing further the Bankruptcy Court could do to be "in conformity" with the remand as there were no funds left from which to repay the Post-Petition Loans.

Accordingly, the May 11, 1998 Bankruptcy Court order is AFFIRMED because the Post-Petition Loans issue is necessarily moot if the Trust lacks funds to satisfy its outstanding obligations.

CONCLUSION

For the reasons stated above, both orders are AFFIRMED, this case is CLOSED, and any pending motions are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of March, 1999.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

HOLYWELL CORPORATION, et al.,

Debtors.

Chapter 11

Case Nos.: 84-01590/94-BKC-PGH

MEMORANDUM ORDER DENYING AS MOOT DEBTORS' REMANDED MOTION FOR REPAYMENT OF THE POST-PETITION LOANS AND DENYING MOTIONS FOR REHEARING

THIS MATTER came before the Court on April 14, 1998, for a remand hearing regarding certain post-petition loans, pursuant to an order from the United States District Court, Southern District of Florida (the "District Court"). Having reviewed the memoranda, case law, and evidence submitted by the parties, and having heard argument of counsel, the Court hereby makes and enters the following findings of fact and conclusions of law:

Issues for Determination on Remand

On November 4, 1988, the District Court affirmed in part, reversed in part, and remanded to this Court certain Orders pertaining to three post-petition loans. *The Bank of N.Y. v. Holywell Corp.*, No. 89-970 (S.D. Fla. Nov. 4, 1988). The District Court remanded this matter to this Court to: (i) clarify and/or supplement its orders to assure that repayment of the loans be made to the *estates* of Gould and Holywell, subject to the claims of the remaining creditors of the estate, and (ii) ascertain, where necessary,

the specific source of the repayment funds. *The Bank of N.Y. v. Holywell Corp.*, No. 89-970 slip. op. at 11. Holywell Corporation (the "Debtors") appealed that ruling to the Eleventh Circuit, which affirmed same in 1991. *Bank of N.Y. v. Holywell Corp.*, No. 89-5950 (11th Cir. Jan. 9, 1991).

In 1994, the Debtors moved for evidentiary hearings in connection with the remand. By Order of March 9, 1994, this Court determined that the issues on remand would only become relevant if there were funds available for distribution to the Debtors and accordingly denied the Debtors' motion as premature. *In re Holywell Corp.*, No. 84-01590 (Bankr. S.D. Fla. Mar. 9, 1994) (order denying without prejudice motion to schedule evidentiary hearings on remand of "super priority" loans appeal by Holywell Corporation). The parties have agreed, in connection with the Court's establishment of a procedure for the closing of these 14-year old cases, that it is now possible to determine whether or not there will be funds available for a distribution to the Debtors. The Court set the remand hearing to determine that question.

Findings of Fact

1. Prior to the Debtors' bankruptcy proceeding, the Bank of New York (the "Bank") lent $197 million to the Debtors for construction of a large commercial project known as the Miami Center Project.

2. After the commencement of these Chapter 11 cases, but before the confirmation and consummation of the Amended Plan of Reorganization proposed by the Bank ("the Plan"), the Debtors moved this court for

authorization to sell three office buildings in the Washington, D.C. area which had been pledged to the Bank as collateral for its loans to the Debtors (the "Washington Properties"). The Bank filed a motion for a determination that the net proceeds of such sales were cash collateral of the Bank. The Court authorized the sale of the Washington Properties and ordered that the net proceeds otherwise payable to the Debtors and their wholly-owned subsidiaries constituted cash collateral of the Bank. The net proceeds from the sale of the Washington Properties, of approximately $32 million, were deposited into interest-bearing accounts in early 1985.

3. Thereafter, Debtor Miami Center Limited Partnership ("MCLP") sought authorization to borrow the proceeds from the sale of the Washington Properties to pay construction costs and property tax obligations of MCLP. This request was granted and MCLP was given authority to borrow a sum totaling in excess of $4.7 million (the "Post Petition Loans"). The Post Petition Loans were then given super priority status over all other claims against MCLP, except for the Bank's lien.

4. Several months later, the Bank's Plan was overwhelmingly approved by creditors and was confirmed. The Plan substantively consolidated the five debtors, provided for the use of the proceeds from the Washington Properties to pay creditors, and created the Miami Center Liquidating Trust (the "Liquidating Trust") to collect all the Debtors' cash and property for payment to creditors.

5. After the effective date of the Plan, the Trustee moved for authority to pay the Post-Petition Loans and

the discharged debtors moved for repayment to themselves and to Twin Development Corporation ("Twin"), a wholly-owned subsidiary of Debtor Holywell Corporation. The Debtors' motion was granted, and the Bank and Trustee appealed.

6. The District Court reversed in part, holding that the Liquidating Trust – and not the discharged Debtors and Twin – "owned and owed" the Post-Petition Loans. *The Bank of N.Y. v. Holywell Corp.*, No. 89-970, slip op. at 7, n. 12 (S.D. Fla. Nov. 4, 1988) and thus the super priority loans were eliminated. In so holding, the District Court stated:

> Thus the assets and liabilities of all the consolidated debtors would thereby become merged, eliminating all inter-debtor obligations and guarantees.

Id. at 7.

The Debtors appealed to the Eleventh Circuit, which affirmed in an unpublished opinion and stated:

> In this case, the appellants challenge the district court's determination that certain "super priority" loans be repaid to the estates of the debtors, rather than the discharged debtors. The district court's determination is mandated by the express terms of the plan of reorganization and by common sense. *Bank of N.Y. v. Holywell Corp.*, No. 89-5950, slip op. at 2 (11th Cir. Jan. 9, 1991).

7. In 1997, the last significant non-cash asset of the Liquidating Trust, Gould's interest in the Miami Center Joint Venture partnership, was reduced to cash. The only remaining creditors of the Liquidating Trust other than the discharged Debtors and their affiliates are the Trustee,

his counsel, his accountants, and the Bank as the holder of a Trustee's Certificate. The Bank received the Trustee's Certificate as a Class 1 claim after paying over $22 million for Claim 502, a claim filed by Miami Center Joint Venture. This Court upheld the validity, amount and priority of the Trustee's Certificate against direct challenges and counterclaims by the Debtors, in adversary proceeding number 94-0014-BKC-PGH-A, and that ruling was affirmed by both the District Court and the Eleventh Circuit. The Trustee's Certificate is expressly subordinate to the allowed fees and expenses of the Trustee and his professionals.

8. It is now apparent that the Trust will not have sufficient assets with which to pay all these obligations. The Liquidating Trustee's report of March 31, 1998 reflects cash of $1,089,410.96. The Trustee's Certificate held by the Bank had a balance due of $11,232,638.37 in June of 1997. Since that time, the Trustee has made a payment of $500,000 to the Bank, but additional interest, exceeding $400,000 has accrued. Without estimating the final fees and costs payable to the Trustee, his counsel, and his accountants, it is apparent that the Trust will be unable to repay over $10,000,000 of the amount owed to the Bank as holder of the Trustee's Certificate.

Conclusions of Law

9. Accordingly, the Court finds that there will be no residual distribution to the Debtors or Twin since all of the remaining claims of the estates of the Debtors will not be paid in full. As the District Court held: " . . . the discharged Debtors' claims may not accrue, in effect,

until the remaining creditors of Gould and Holywell 'have been made whole.' " *Bank of N.Y. v. Holywell Corp.*, No. 87-970, slip op. at 10 (S.D. Fla. Nov. 4, 1988). Thus, it is not necessary to clarify or supplement this Court's order to assure repayment of loans to estates of Gould and Holywell since those loans will not be repaid. Therefore, it is also not necessary to ascertain the source of the repayment funds.

10. The Plan provided that the Liquidating Trust acquired all of the Debtors' property upon the effective date, including the stock and assets of wholly-owned subsidiaries of Holywell Corporation. Such property included the Post-Petition Loan and collection rights of Gould, Holywell, and Twin, against Debtor MCLP. Any repayment of such loans by the Liquidating Trust (for the estate of MCLP) to the Liquidating Trust is entirely pointless unless the Debtors and their wholly-owned subsidiaries will receive a residual distribution.

11. Having determined that there will be no Trust assets distributable to the Debtors after all creditors with priority claims have been paid, the Court now concludes that repayment of the Post Petition Loans is moot.

12. The Bank has confirmed that it will defend the remaining appeals affecting the interests of the Bank and the Trustee so that the Trustee and his counsel will not incur further expenses. The Bank's indemnity agreement, as reaffirmed by the Bank to the Trustee in their settlement agreement in the income tax adversary proceeding, remains in place in the event that any of the Debtors' appeals are successful and result in the imposition of a

cost upon, or obligation of, the Trustee after the closing of the cases.

13. Therefore, these cases are now ready to be closed. The Trustee and his professionals are directed to file final fee applications within 30 days from the date of this Order so that final payments can be made and a closing order entered.

Order

Based upon the foregoing, the motion of the Debtors (including the claim of Holywell's subsidiary, Twin Development) for repayment of the Post-Petition Loans after remand is hereby denied as moot. Accordingly, the motions of the Debtors for a rehearing on (a) the Court's Order setting a procedure for the closing of the cases, and (b) the order dismissing the Complaint in *Gould v. The Bank of N.Y. and Fred Stanton Smith*, Adv. Pro. No. 97-1119-BKC-PGH-A, are also denied.

DONE AND ORDERED in Fort Lauderdale, Florida this 11th day of May, 1998.

/s/ Paul G. Hyman, Jr.
Paul G. Hyman, Jr.
United States Bankruptcy Judge

Copies furnished to:

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[Attorney Vance E. Salter is directed to mail a conformed copy of this Order to all interested parties except those listed above and to file a Certificate of Service with the Clerk of the Bankrutpcy [sic] Court.]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE:	Chapter 11
HOLYWELL CORPORATION, et al., Debtors. /	Case Nos.: 84-01590/94-BKC-PGH
THEODORE B. GOULD, acting on behalf of the MIAMI CENTER LIQUIDATING TRUST, Plaintiff, v. THE BANK OF NEW YORK and FRED STANTON SMITH, Defendants. /	Adv. Proc. No.: 97-1119-BKC-PGH-A

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

This Adversary Proceeding was before the Court on December 1, 1997 on the motions of each defendant, THE BANK OF NEW YORK ("Bank") and FRED STANTON SMITH, LIQUIDATING TRUSTEE ("Trustee") to dismiss the complaint filed and served by the plaintiff, THEODORE B. GOULD ("Gould").

The Court reviewed the complaint, the defendants' motions, and the prior contempt orders and prior appellate rulings submitted by the defendants; the Court also heard argument by Mr. Gould, *pro se*, and counsel for the

defendants. Based upon the foregoing, it is hereby ordered and adjudged that:

1. The motions to dismiss are hereby granted, with leave to amend upon timely compliance with the obligations imposed by the Court in prior, unstayed Orders, as described below.

2. In accordance with the "Order of Certification of Contempt" entered by this Court on May 1, 1990 and affirmed by the District Court, Gould was required to obtain representation by "an attorney admitted to practice before the United States District Court for the Southern District of Florida and the United States Bankruptcy Court" in order to preclude Gould from rearguing serial claims and arguments "continuously rejected by this and other Courts." Gould, who is not an attorney, did not comply with the order; the Complaint in this adversary proceeding and the discovery requests were signed by Gould and Gould alone in October, 1997. The Court finds that Gould's failure to comply with the prior Order warrants dismissal of the complaint.

3. Gould has also failed to make payment to the Liquidating Trust of a monetary contempt sanction imposed in 1994 in Adversary Proceeding 94-0014-BKC-PGH-A. This Court's Order of June 13, 1994, affirmed by the District Court, imposed sanctions of $24,770.00 upon Gould and his Virginia counsel, Robert Musselman, pursuant to Fed. R. Bankr. P. 9011. As adjusted for post-judgment interest and a setoff allowed by the Court, the balance due and unpaid was $29,108.96 as last reported by the Trustee. Gould offered no testimony or other evidence to prove any inability to pay the balance due. The

Court finds that the coercive and remedial purposes of the contempt order will be served by requiring Gould to pay the contempt award before Gould (proceeding through counsel, as required) is allowed to pursue any further claims, whether in his own name or indirectly. The Court also finds that Gould's existing non-compliance with the contempt award is a second and independently-sufficient basis for the dismissal of the complaint.

4. The complaint also includes claims which are barred by the applicable statutes of limitations and by prior adjudications that are matters of record in these bankruptcies. The complaint's allegations of breaches of duty pertaining to closing adjustments relate to a closing that occurred in 1985 pursuant to the confirmed, substantially consummated plan of reorganization, and to a specific adversary proceeding decided in 1987 and appealed thereafter. The matter was completely adjudicated by 1990, over seven years before the complaint was filed. Contrary to Gould's arguments to the Court, Florida's statutes of limitations do bar untimely equitable actions; see, for example, Sections 95.11(2)(b), (3)(j), (3)(k), (3)(p), and (6), Fla. Stat. (1996). The Trustee in this case has consistently acted and made disbursements in accordance with the confirmed Plan and with orders of this Court; Gould has regularly appealed those Orders with which he disagreed. The complaint does not specify any action which has been taken by the Trustee (a) in an individual capacity – though the complaint purports to seek relief from Smith individually, or (b) without authority provided by the confirmed Plan or Court Order. Each of these pleading deficiencies also warrants dismissal of the complaint in its present form.

5. This dismissal is without prejudice to Gould's right to file and serve an amended complaint, on or before January 2, 1998, provided he complies with the unstayed contempt Orders before filing an amended complaint. Specifically, Gould must obtain representation by a Florida-licensed attorney as required in the May 1, 1990 Order, and Gould must pay the Trustee the balance due under the contempt order of June 13, 1994, before filing such an amended complaint. In the event that Gould does not comply with these requirements or does not file an amended complaint on or before January 2, 1998, the dismissal shall, without further notice, hearing, or Order, thereupon be deemed a dismissal of the complaint with prejudice.

DONE AND ORDERED this 8 day of December, 1997, at Fort Lauderdale, Florida.

/s/ Paul G. Hyman
PAUL G. HYMAN
UNITED STATES
BANKRUPTCY JUDGE

Conformed copy furnished to:

Vance E. Salter, Esq., who
upon receipt shall distribute
a conformed copy of this Order
to the following:

Herbert Stettin, Esq.
Theodore B. Gould, *pro se*

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS.: 84-01590-BKC-PGH
84-01591-BKC-PGH
84-01592-BKC-PGH
84-01593-BKC-PGH
84-01594-BKC-PGH

CHAPTER 11

In re:

HOLYWELL CORPORATION, MIAMI CENTER LTD. PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Debtors.
_____/

ORDER ON MOTION TO SCHEDULE EVIDENTIARY HEARING ON REMAND OF "SUPERPRIORITY" LOANS APPEAL

THIS MATTER having come before the Court on January 19, 1994 on the motion of Debtors Theodore B. Gould and Holywell Corporation for an evidentiary hearing on remand of the district court's decision in *Bank of New York v. Holywell Corp.*, No. 87-970-Civ-Kehoe slip op. (S.D. Fla. Nov. 4, 1988), and the Court having reviewed the motion and court file, and having considered argument of the parties, and being otherwise advised in the premises, it is hereby

ORDERED and ADJUDGED:

1. The motion is denied without prejudice to being re-filed at a later date because the issues to be determined on remand are not ripe for adjudication.

2. During the administration of the bankruptcy estates, the proceeds from the sale of certain properties in the Washington, D.C. area, which were subsequently determined to be "cash collateral" of The Bank of New York under 11 U.S.C. § 363, were segregated and held subject to further Court order. Portions of the sale proceeds were later advanced as loans to certain of the Debtors for operating and construction purposes. Those loans were given priority status, superior to all claims against Debtor Miami Center Limited Partnership ("MCLP"), except the bank's lien. In reality, these loans were inter-debtor loans and loans from debtor-controlled affiliates.[1]

3. Subsequent to these "superpriority" loans, the Court confirmed the pan of reorganization which substantively consolidated the Debtors' assets and subordinated all of the claims of the Debtors and their affiliates to the claims of other creditors.

4. After confirmation, the Court entered an order authorizing the Trustee to pay the discharged Debtors the "superpriority loans," and the bank appealed. The Trustee, although named as an appellee, appeared in the appeal and asserted that the "superpriority loans" should not be repaid in light of the terms of the plan.

5. The district court agreed, holding that the Trust "owned and owed" the loans; Order on Bankruptcy

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[1] These facts and the facts which follow are taken directly from *Bank of New York v. Holywell Corp.*, No. 87-970 slip op. at 2-3 (S.D. Fla. Nov. 4, 1988).

Appeal at 7 n. 12, and the principals of substantive consolidation extinguished the inter-debtor liabilities; Order on Bankruptcy Appeal at 7. The district court ruled that the absolute priority rule precluded repayment until all remaining creditors have been paid in full. *Id.* at 10. Judge Kehoe concluded:

> Wherefore, to the extent the subject loans are repayable as 'super-priority' obligations of MCLP ahead of the claim of any MCLP creditors, the appealed Orders should be, and are, affirmed. Furthermore, to the extent necessary to be in conformity with this opinion, this matter is remanded to the Bankruptcy Court (i) in order to clarify and/or supplement its Orders to assure that repayment of the loans be made to the *estates* of Gould and Holywell, subject to the claims of the remaining creditors of the estate, and (ii) to ascertain, where necessary, the specific source of the repayment funds.

Id. at 11.

6. The Debtors have now requested the Court to conduct an evidentiary hearing on the remanded issues. Both the Trustee and The Bank of New York argue that no such hearing is necessary because unless and until there is a determination that there will be assets of the Miami Center Liquidating Trust available for distribution to the Debtors as residual beneficiaries of the Trust, which will be at the end of the case, the remand proceedings are premature. They argue that the issues on remand will only become relevant if there are funds available for distribution to the Debtors, and that it would be a waste of judicial time and resources and an unnecessary expense to the parties to litigate those issues at this state.

They further argue that the issues on remand are moot in light of these facts. The Court agrees that it is premature to conduct an evidentiary hearing at this time.

7. Unless and until the Trustee determines that there will be Trust assets available for distribution to the Debtors after all creditors with priority claims have been paid, the issues on remand are not ripe for adjudication.

8. Accordingly, the motion to schedule an evidentiary hearing on the issues remanded from *Bank of New York v. Holywell Corp.*, No. 87-970 slip op. (S.D. Fla. Nov. 4, 1988) is hereby denied without prejudice.

DONE and ORDERED in Chambers, Miami, Dade County, Florida, this 9 day of March, 1994.

/s/ Paul G. Hyman
PAUL G. HYMAN
UNITED STATES
BANKRUPTCY JUDGE

Conformed copies furnished
to Herbert Stettin, Esquire,
for distribution to all parties

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-5950

D.C. Docket No. 87-970-CIV-JWK

IN RE: HOLYWELL CORPORATION,

Debtor.

THE BANK OF NEW YORK,
FRED STANTON SMITH, as
Liquidating Trustee of Miami
Center Liquidating Trust,

Plaintiffs-Appellees,

versus

HOLYWELL CORPORATION,
THEODORE B. GOULD,
TWIN DEVELOPMENT CORPORATION,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(January 9, 1991)

Before KRAVITCH and ANDERSON, Circuit Judges, and LYNNE*, Senior District Judge.

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*Honorable Seybourn H. Lynne, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

This Appeal is another of the many appeals brought by the investors in the Miami Center project. This court has described the background of the project in prior opinions, and we will not do so again here. *See, e.g., Miami Center Ltd. Partership v. Bank of New York*, 83 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69 (1988).

In this case, the appellants challenge the district court's determination that certain "super priority" loans be repaid to the estates of the debtors, rather than the discharged debtors. The district court's determination is mandated by the express terms of the plan or reorganization and by common sense. Appellants also challenge the validity of the trustee in this case. This contention is frivolous and moot.

AFFIRMED.[1]

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[1] All pending motions are denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 87-970-CIV-KEHOE

THE BANK OF NEW YORK,

Apellant, [sic]

v.

ORDER ON
BANKRUPTCY APPEAL

(Filed Nov. 04, 1988)

HOLYWELL CORPORATION,
THEODORE B. GOULD,
et al.,

Appellees.

_____/

THIS IS AN APPEAL from the United States Bankruptcy Court for the Southern District of Florida, involving the legal status and priority of certain loans made by two debtors to another debtor during the pendency of five related bankruptcy cases.[1] This Court has jurisdiction in this matter pursuant to Title 28, United States Code, Section 158.[2]

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[1] Case Nos. 84-01590, 85-01591, 84-01592, 84-01593 and 84-01594.

[2] The Bankruptcy Court's findings of fact may not be reversed unless shown to be "clearly erroneous." Bankruptcy Rule 8013 and Fed.R. Civ.P. 52(a). The Bankruptcy Court's conclusions of law are reviewable *de novo*. *In re Multiponics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980).

I.
BACKGROUND OF BANKRUPTCY PROCEEDINGS

Five interrelated debtors filed for bankruptcy in August 1984. One of the five debtors, Theodore B. Gould ("Gould") had the controlling interest in the other four debtors: Holywell Corporation ("Holywell"), which was owned one hundred percent by Gould and which itself owned one hundred percent of Twin Development Corporation ("Twin"), its subsidiary, and interests in various Gould partnerships; Miami Center Limited Partnership ("MCLP"), of which Gould was a limited partner and the individual general partner; Miami Center Corporation ("MCC"), which was owned one hundred percent by Holywell, and which served as a limited partner and as the corporate general partner of MCLP; and Chopin Associates ("Chopin"), a general partnership owned equally by Gould and MCC, which was the owner and lessor to MCLP of the property encompassing the Miami Center Project,[3] the essential business enterprise encompassing the bankruptcies of the five debtors. (Debtors Holywell and Gould are appellees herein, as is Twin. The Liquidating Trustee, Fred Stanton Smith, although named as an appellee, has stated that his " . . . interest . . . is in fact the same as that of the Appellant," The Bank of New York.)

The Appellant Bank of New York ("Bank") lent $197 million dollars to the debtors for construction of the

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[3] The Miami Center Project was a large commercial project situated prominently in downtown Miami, Florida, consisting of an office building, hotel, garage, rental space, furnishings, fixtures and equipment.

Miami Center Project. During the bankruptcies, the proceeds of the sale of certain "cash rich" properties (three buildings developed by Gould in the Washington, D.C. area), which had been pledged by the debtors in connection with the loan, were determined to be "cash collateral" of the Bank under Title 11, United States Code, Section 363, to be segregated and held subject to further order of the Bankruptcy Court.[4] The three buildings ("Washington Properties") were subsequently sold, with net proceeds of approximately $32 million, part of which was thereafter advanced to the debtors as a post-petition loan because of MCLP's operating losses. That loan and other, similar loans from the Washington Properties were given "super-priority" status superior to all claims against MCLP except the Bank's lien. (The principal amount of the loans exceeded 4.7 million.)

Subsequent to those "super-priority" loans, the Bankruptcy Court approved the substantive consolidation feature of the Bank's Plan and confirmed the Bank's Plan[5] Well over a year after the effective date of the Plan, the Liquidating Trustee moved for authority to pay the super-priority claims, which was followed with the filing

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[4] No appeals were taken from these determinations, with the proceeds becoming "property of the estates" under 11 U.S.C., § 541(a)(6).

[5] The order of substantive consolidation and the confirmation of the order confirming the Bank's Plan were ultimately affirmed by the District court. *Holywell Corporation v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The debtors' appeal therefrom was dismissed. *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987).

of similar motions by the Debtors and by Twin for payment to themselves. This appeal is from the granting of those three motions and from the denial of the Bank's motion for rehearing and clarification.

II.

ISSUES ON APPEAL

The Bank's first contention in this appeal is that it was error to rule that the discharged Debtors, and not the Liquidating Trustee, owned the post-petition loans. The Bank further contends on appeal that it was error to authorize the Liquidating Trustee to repay the post-petition loans, because the loans had either become extinguished by substantive consolidation or, if they survived, were subordinated.

In support of these arguments, the Bank emphasizes, inter alia, the following facts. First of all, in an earlier appeal in these bankruptcies, another judge of this Court ruled that Gould and Holywell, the movants for the sale of the Washington Properties, " . . . repeatedly made representations to the effect of acknowledging that the proceeds from the Washington Properties allocable to Twin would be available to creditors in satisfying claims against their estates in bankruptcy."[6] That Court affirmed the Bankruptcy Court, which granted the Liquidating Trust" . . . complete control over Twin's proceeds arising from the sale of the Washington properties . . . "[7] Also,

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[6] *Holywell Corporation v. The Bank of New York*, Case No. 86-0848-CIV-RYSKAMP, Order of February 20, 1987, at p.6.

[7] Footnote 6 at p. 11.

because the Gould and Holywell estates were relatively solvent and the MCLP estate was insolvent, creditors of the former estates had concerns about protecting their own particular interests. At the hearing, and as reflected in the order, on the motion for the approval of the loans, there was agreement that the loans should be restored to the Holywell and Gould estates, from which they came, before the claims of the MCLP creditors, other than the Bank. Furthermore, under the Amended Consolidated Plan, a Trust was established, with a " . . . designated . . . Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code . . . ," with the result that the post-petition loans become a nullity, inasmuch as the Liquidating Trustee owned the rights to repayment of the loans and, at the same time, had the duty to repay the loans from the cash and property within the Trust. Thus, the bank concludes that the Trustee should have "cancelled" the promisory [sic] notes or else have written a repayment check to himself.[8]

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[8] The Bank also argues that while the Debtors would ordinarily be expected to oppose the payment of any claim from the Liquidating Trust, in this instance, they did not oppose the repayment of the post-petition loans, but rather moved for such repayments when they realized that the assets in the Liquidating Trust would be insufficient to pay the claims of all creditors, particularly in contemplation of the large payment to be made to Olympia & York Florida Equity Corporation (Gould's partner in the Miami Center Joint Venture).

A.

The Bankruptcy Court Erred in concluding that the Debtors, and not the Liquidating Trustee, Owned the Post-Petition Loans

Pursuant to the Amended Consolidated Plan of Reorganization, a Trust was established

> . . . of all property of the estates of the Debtors within the meaning of § 541(a) of the code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan.

By the terms of the Plan, the "Washington Proceeds" are includable as property ("proceeds" or "product") within the meaning of section 541(a)(6) of the Bankruptcy Code.[9] Another judge of this Court has, in effect, found the "Washington Proceeds" to be part of the trust, and the Eleventh Circuit court of appeals has affirmed, as moot,

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[9] § 541, Property of the Estate

(a) The commencement of a case under sect[illegible] 301, 302, or 303 of this title creates an estate. Such estate is [illegible]mprised of all the following property, wherever located and whomever held:

* * *

(b) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

an appeal therefrom.[10] Furthermore, from the facts presented, it appears clear that the post-petition loans come within the provisions of Section 541(a)(7) of the Bankruptcy Code, as an interest in property by the estate acquired after commencement of the case.[11]

Thus, upon the effective date of the Plan, by its own terms, these "proceeds" became the property of the estate under Section 541(a), with the rights to repayment becoming property of the Liquidating Trustee, and with the liability of the MCLP to repay the loans becoming a claim against the Liquidating Trustee.[12]

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[10] *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986); *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987).

[11] For the proposition that under section 541(a)(7), the property of the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case," see *Matter of Wilson*, 694 F.2d 116, 237-8 (11th Cir. 1982).

[12] As succinctly stated in the Appellant's Initial Brief, upon the effective date of the Plan, "the Liquidating Trustee both *owned* and *owed* those Loans." [emphasis added]

B.

The Bankruptcy Court Erred in Concluding and Authorizing the Liquidating Trustee to Repay the Post-Petition Loans, to the Extent they Were Extinguished by Substantive Consolidation[13]

"[L]iabilities of consolidated entities *inter se* are extinguished by . . . consolidation." *In Re Auto-Train Corporation*, 810 F.2d 270, 276 (D.C. Cir. 1987). Thus, the assets and liabilities of all the consolidated debtors would thereby become merged, eliminating all inter-debtor obligations and guarantees.[14]

This legal principle applies to the present case. As indicated by the Bank, even the Debtors themselves have acknowledged in prior District court proceedings, see *Holywell Corporation v. Bank of New York*, 59 B.R. 340, 350 (S.D. Fla. 1986), and in a brief before the Eleventh Circuit

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[13] Additionally, under this issue, the Bank argues that even if the post-petition loans survived substantive consolidation, they were subordinated by virtue of Sections 1142(a) and (b), of the Code, pursuant to which an entity organized to carry out the plan and the Bankruptcy Court are charged with implementing the Plan, and that nowhere under the Code is such an entity or the Court authorized to modify the plan's priorities. Thus, the Bank argues that even if there is no substantive consolidation, nonetheless, because the Debtors, as Affiliated Creditors under the Plan, are assigned a priority lower than Olympia & York Florida Equity Corporation, the as-yet unpaid creditor, their claim is thereby subordinated and the priorities of the plan may not be changed. See, e.g., *Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358 (5th Cir. 1962).

[14] See, e.g., *In Re Richton International Corporation*, 12 B.R. 555, 556 (Bkrtcy S.D.N.Y. 1981).

Court of Appeals, that these inter-debtor loans were, in fact, eliminated by substantive consolidation.[15]

C.

In response to the issues raised by the Bank, the Debtors rely strongly on the position taken by the Bankruptcy Court that " . . . the substantive consolidation of the five estates . . . did not extinguish any of the post-petition claims presently under consideration . . . [and that] . . . [i]f this result was in fact intended by the [B]ank when it presented its plan, it should have been made explicit [inasmuch as the Bankruptcy Court] . . . would not have confirmed a plan nullifying . . . " the post-petition loan orders.[16]

Acknowledging the considerable weight and deference to be accorded to the Bankruptcy Court's position, nonetheless, the present facts and attendant legal considerations militate against the approval of such a result. First of all, unlike the more customary situation, this case involves the infusion of funds originating not from a party or source outside the assets or control of the bankrupt entities, but rather from two inter-related party debtors to yet another inter-related party debtor. In other words, these particular "super-priority" loans consist of funds not newly-created and infused into the case, but

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[15] In the "Brief of Appellants [Debtors]," at p.12 (Case Nos. 86-5286 and 86-5386) the Debtors argue to the Eleventh Circuit Court of Appeals that "[t]he consolidation had the intended effect of eliminating all inter-Debtor claims, such as super-priority loans from Gould and Holywell to MCLP."

[16] Order Denying Reconsideration, April 1, 1987.

rather of funds previously existing and accounted for, within the assets of, or under the control of, certain of the co-debtors, that is, funds already within the purview of the bankruptcies. Such funds are clearly distinguishable from those found, for example, in the case of *In Re Flagstaff Foodservice Corporation*, 739 F.2d 73 (2d Cir. 1984), relied upon by the Appellees, where a creditor infused fresh funds, previously no part of, and unknown to, the bankruptcy case. *Flagstaff Foodservice*, therefore, lacks a basic underlying factor for the "super-priority" status of the present loans, namely, the protection of the lenders' creditors over the creditors of the loans' recipient. Thus, in part, because the Appellant Debtors, upon discharge, walked away from the bankruptcies, free of any *liabilities*, vis-a-vis the "super-priority" loans, they should not now be heard to assert a claim to the *assets*.

Indeed, if the course of the loans were to be mapped out, the funds would be seen travelling from the lender debtors (Point A) to the recipient debtor (Point B). Then, when repayment funds became available, the funds would be seen returning from Point B to Point A. Where, in the interim, however, substantive consolidation has occurred and the resultant Liquidating Trust has been created, Point A has *become* Point B, and vice versa. Therefore, the only remaining movement, to the extent it can be meaningfully described, would be viewed as a constructive repayment entirely within the trust itself and would, so to speak, constitute a "taking from Peter to pay Paul" from one "estate" within the merged debtors to another.[17]

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[17] One of the alternate remedies sought by the Bank is a "formal transaction" whereby the Liquidating Trustee, who is

Secondly, especially in view of the posture and interrelation of the parties and of the surrounding circumstances presented, there is a legal consideration to be noted and observed; namely, the full and absolute priority rule, see *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 61 S.Ct. 675, 682, 85 L.Ed. 982 (1941), which " . . . precludes the participation of equity interests in assets until the creditors have been made whole." *In Re Evans Products Company*, 65 B.R. 870, 873 (S.D. Fla. 1986). Thus, the discharged Debtors' claims may not accrue, in effect, until the remaining creditors of Gould and Holywell "have been made whole."

D.

A final issue is presented by the Appellees, asserting that the Liquidating Trustee cannot legally exist under the Bankruptcy Code and thus cannot be said to own the super-priority loans. As the Appellant Bank aptly points out, this issue was not raised below in the Bankruptcy Court and that no appeal was taken from the order appointing the Liquidating Trustee. Therefore, no comment on this point is called for.

III.

Wherefore, to the extent the subject loans are repayable as "super-priority" obligations of MCLP ahead of the

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responsible for the subject assets *and* liabilities, would write a repayment check in his capacity as the "super-priority" loans debtor, to himself in his capacity as the "super-priority" loans creditors.

claims of any MCLP creditors, the appealed Orders should be, and are, affirmed. Furthermore, to the extent necessary to be in confirmity [sic] with this opinion, this matter is remanded to the Bankruptcy Court (i) in order to clarify and/or supplement its Orders to assure that repayment of the loans be made to the *estates* of Gould and Holywell, subject to the claims of the remaining creditors of the estate, and (ii) to ascertain, where necessary, the specific source of the repayment funds.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of Nov., 1988.

/s/ James W. Kehoe
JAMES W. KEHOE
UNITED STATES
DISTRICT JUDGE

Copies furnished to:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re: HOLYWELL CORPORATION, et al., Debtors.	CASE NO. 84-01590-BKC-TCB CHAPTER 11

ORDER ON DEBTORS' MOTIONS FOR PAYMENT OF THEIR "SUPER-PRIORITY" CLAIMS

In January, February and April, 1985, these five related chapter 11 debtors obtained permission under 11 U.S.C. §364(c) to borrow money to meet operating emergencies. The debt was secured by giving the lenders priority administrative liens. (C. P. Nos. 313, 404 and 492). A total of $4,717,404 was borrowed to complete construction of the Miami Center, pay property taxes, and pay other operating expenses. About $5.5 million is presently owed upon these obligations, which accrue interest at the rate of $1,113 a day.

A few months later, in August 1985, a liquidating plan was confirmed by this court (C. P. No. 906) and a liquidating trustee was directed to liquidate the debtors' estates and discharge all obligations, including these. There are some 400 creditors with claims of $350 million and the trustee has not yet completed his task. The protracted and costly delay has resulted from still pending appeals of this court's orders and from litigation pending in non-bankruptcy courts between these debtors and many of their major creditors over the amounts owed.

The trustee reported at this hearing that if all existing court orders remain undisturbed, he will have sufficient funds to pay all remaining claims in full with interest, including these claims. However, because of the present uncertainties and contingencies, the issues here today (and a number of others) remain hotly contested. The debtors, a non-debtor subsidiary (Twin), a creditor affiliated with the debtors (MCJV), the debtors' major creditor (BONY) and the trustee have all argued this issue. (C. P. Nos. 1506, 1516, 1542, 1544, 1553, 1554, 1554a and 1556).

The lender/movants, Holywell and Gould (two of the five related debtors) and Twin (a wholly-owned subsidiary of the debtor Holywell), want immediate payment of the $5.5 million due them, together with a declaration that the money is not subject to any contingent claim of the trustee. BONY opposes the motions. It argues that movants' claims are subordinate to the unliquidated class 7 claim of MCJV, which totals $14.4 million, and that the repayment would be owned by the trustee and would, therefore, be a meaningless "wash" transaction. The affiliated creditor, MCJV, and the trustee, neither of whom is directly affected, support the movants. BONY's objections are not persuasive.

The reimbursement priority granted to these three lender/movants in the 1985 orders is unambiguous. The following pertinent paragraph appears in each order:

> "The loan to Miami Center Limited Partnership shall be secured by a lien on the assets of Miami Center Limited Partnership which shall be senior to the lien of all other creditors, except the lien of the Bank of New York, and shall have

> priority over the payment of any and all administrative expenses of Miami Center Limited Partnership."[1]

The three loans are to be paid as soon as (a) the lien of the Bank of New York is fully satisfied and (b) the assets of *Miami Center Limited Partnership* (not the assets of the subsequently consolidated five debtors) are sufficient to meet the obligation.

The original lien of the Bank of New York as it then existed and as it was then envisioned was fully satisfied by the trustee's sale in October 1985 of the Miami Center property to the Bank's nominee.[2]

The parties did not then anticipate, much less intend, that this provision include the Bank's subsequent lien created by the July 30, 1985 Second Amendment to the Amended Plan (C. P. No. 479). In that subsequent transaction, the Bank agreed to fund, up to a limit of $14,417,679, any shortage in the trustee's ability to pay the MCJV lease claim after it has been finally settled or adjudicated, which has not yet happened. The Bank will then get as security a trustee's certificate which will be an administrative claim (class 1):

> "secured by, all assets of the debtors' estates after payment or provision has been made for all other Class 1 claims . . . " (Bank's Notice of Filing of Second Amendment, C. P. No. 854, ¶2).

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[1] The differences in the three variants of this paragraph are inconsequential.

[2] The district court reached this conclusion in its affirmance of this court's confirmation order. *Holywell Corporation, et al., v. Bank of New York*, 59 B.R. 340-46 (S.D.Fla. 1986).

It is clear that the Bank's subsequently acquired lien for its contingent advance to the trustee is *subordinate* to the movants' administrative claims. Therefore, neither the Bank nor the trustee has any present or potential claim based upon this transaction which is superior to movants' claims.

The Bank also argues that the substantive consolidation of the five estates, which was provided in the plan confirmed in August 1985, extinguished these debtor claims. The plan, which must be strictly construed against its proponent, the Bank, makes no explicit provision for this result. It was not suggested by the Bank in the Disclosure Statement or otherwise before confirmation. Movants' claims and their repayment are *post-petition* debts and assets. There is no presumption that consolidation embraced post-petition transactions and thus nullified this court's post-petition orders. On the contrary, the liquidating trust created by the plan includes only §541(a) prepetition assets. I reject the Bank's interpretation of the consolidation provision.[3]

The Bank argues, finally, that the subordination of claims of creditors affiliated with the debtors to class 8, behind all other creditors including the class 7 claim of MCJV, requires that payment of movants' post-petition claims to Holywell and Twin (who are affiliated creditors) is subordinated to payment of class 7 prepetition debt. I

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[3] The district court reached this conclusion in its affirmance of this court's confirmation order. *Holywell Corporation, et al., v. Bank of New York*, 59 B.R. 340, 347 (S.D.Fla. 1986).

reject the Bank's interpretation of the subordination provision for the same reason I have rejected its interpretation of the substantive consolidation provision. If the Bank intended by this provision to subordinate post-petition claims and thus nullify this court's three earlier orders, it should have revealed that intention explicitly.

I have not overlooked the Bank's argument that since the money used by movants to make the loans at issue here came from cash collateral pledged to payment of the Bank's original lien, rather than from an outside source, it is inappropriate or implausible that the reorganized debtors now be accorded a claim to repayment of those loans superior to the Bank's claim. The short answer to this argument is that the Bank neither demanded nor received a continuing lien as to these funds. Quite possibly it failed to do so because it hoped for reversal of this court's adverse "true-lease" ruling and because it knew it would have to make these operating advances itself, if the debtors did not, in order to preserve its collateral. Whatever the reason, it failed to retain its lien after its *original* debt was satisfied.

The trustee is authorized and directed to pay these claims if and when the proceeds of the liquidation of the assets of MCLP are sufficient to meet these priority obligations. I am not now aware of any present or potential claim which the trustee may have against the repayment proceeds.

DONE and ORDERED in Miami, Florida this 20th day of March, 1987.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	CASE NO.
HOLYWELL CORPORATION, et al.,	84-01590-BKC-TCB
Debtors.	CHAPTER 11

ORDER DENYING RECONSIDERATION

The motion (C. P. No. 1567) of the Bank of New York for rehearing or clarification of the Order on Debtors' Motions for Payment of their "Super-Priority" Claims dated March 20 (C. P. No. 1564) was heard on March 30. The motion is denied. The Bank's application under B.R. 8005 for supersedeas is granted by a separate order.

One point made by the Bank merits comment. The Bank objects to the following sentence in the eighth paragraph:

> "On the contrary, the liquidating trust created by the plan includes only §541(a) prepetition assets."

I agree with the Bank that the liquidating trust includes all §541(a)(1) through (7) assets. I also agree that I am bound by the statement in *In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982):

> "Although we agree that §541(a)(7) does not render every 'interest in property that the estate acquires after the commencement of the case' available for the debtor's exemption claims, we find that §541(a)(7) does bring into the estate

> every such interest not covered by a specific statutory provision mandating some other treatment."

The sentence objected to by the Bank was not necessary to this decision and should be disregarded. The plan includes all §541(a) assets and, therefore, may include assets acquired after the commencement of the case.

The foregoing correction does not affect the conclusion I reached in the paragraph – the substantive consolidation of the five estates, provided in the plan, did not extinguish any of the post-petition claims presently under consideration. I remain persuaded that this would be an impermissible interpretation of the Bank's plan. The district court reached the same conclusion after hearing this same argument. If this result was in fact intended by the Bank when it presented this plan, it should have been made explicit. I would not have confirmed a plan nullifying the 1985 orders that are at issue here.

Although the Bank argues that the money repaid by the trustee to the debtors on the claims at issue here would be owned by the trustee and would, therefore, be a meaningless "wash" transaction, that was not clear at the March 30th hearing (where the trustee reported to the contrary), and thus this argument affords no present predicate for denial of these motions. Indeed, the trustee has urged payment of these claims. It is not now necessary and it would be imprudent to anticipate issues that are not immediately presented by these motions.

DONE and ORDERED in Miami, Florida this 1st day of April, 1987.

/s/ Thomas C. Britton
Thomas C. Britton
Chief Bankruptcy Judge